Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of BellSouth's Petition for Declaratory Ruling Regarding the Commission's Definition of Interconnected VoIP in 47 C.F.R. § 9.3 and the Prohibition on State Imposition of 911 Charges on VoIP Customers in 47 U.S.C. § 615a-1(f)(1)	WC Docket No. 19-44

COMMENTS OF THE MADISON COUNTY, ALABAMA EMERGENCY COMMUNICATIONS DISTRICT

TABLE OF CONTENTS

The Madison County, Alabama Communications District ("MCCD") submits these comments in response to the Commission's Public Notice[1] in the above-referenced proceeding.

I. INTRODUCTION

In its Petition for Declaratory Ruling, BellSouth Telecommunications, LLC ("BellSouth") seeks to raise new preemption arguments that it failed to raise in previous federal judicial proceedings that helped frame the positions on which the MCCD and other 911 districts in Alabama have long-relied. Specifically, back in 2007, BellSouth argued in federal court in Alabama that Alabama's Emergency Telephone Services Act (the "ETSA"), specifically Alabama Code § 11-98-5.1(c), imposes 911 charges on a per-telephone number basis for VoIP service. The federal court in Alabama agreed with BellSouth and, in a 2009 Opinion and Order, confirmed that the ETSA required service providers to bill 911 charges on each telephone number provided to users of VoIP service.

In its Petition, BellSouth now seeks a declaration from the FCC that its (and the federal court's) interpretation of the ETSA violates federal law and is, therefore, preempted. A ruling in BellSouth's favor on preemption—if given retroactive effect—could throw 911 funding into chaos with VoIP service providers and customers that billed and paid 911 charges on a per-telephone number basis seeking refunds of previously remitted 911 charges.

In addition to its novel preemption argument, Bellsouth's Petition seeks to fundamentally alter the FCC's long-standing definition of interconnected-VoIP set forth in 47 C.F.R § 9.3. The current Rule considers whether the service (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-

[1] *See Pleading Cycle Established for Comments on Petitions for Declaratory Ruling Filed by Bellsouth and Alabama 911 Districts,* Public Notice, DA 19-125 (rel. February 26, 2019).

compatible customer premises equipment ("CPE"); and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network. BellSouth wants the Commission to impose a fifth requirement in the definition—that the customer specifically ordered or contracted for interconnected-VoIP service from the provider. BellSouth is effectively asking the Commission to amend its existing rules and make such changes retroactive. BellSouth's request goes far beyond the scope of this proceeding which is a referral from a federal district court for guidance as to what the federal VoIP rules were during the relevant period.[2] The Commission already has an existing Rulemaking proceeding to consider changes to the definition of I-VoIP.[3] That proceeding is the proper forum to consider BellSouth's requested changes to the rules. If the Commission were to add BellSouth's proposed fifth prong to the I-VoIP definition, it should give only prospective effect to the ruling. To do otherwise would, again, create chaos between 911 districts and service providers (and probably between many others) that have relied on the longstanding four-part definition of I-VoIP.

Finally, BellSouth's attack on the Alabama 911 Districts' method of compensating their auditor reveals a striking level of ignorance about the well-documented shortage in funding for 911 emergency services. 911 agencies typically do not have the funding to pay an auditor on an hourly-fee basis to conduct 911 charge audits of service provider remittances. Compensating an auditor based on moneys collected from the audit is often the only financially viable option.

---

[2] Order, *Bell Atlantic-Delaware, Inc. v. Frontier Comms. Servcs.*, 16 FCC Rcd. 8112, 8120 (2001) ("We are mindful that the Commission has been asked to clarify or revise existing regulations…. But because this has come before us as part of [an adjudicatory] proceeding regarding past behavior, we are constrained to interpret our current regulations and orders.").

[3] *See In the Matter of Amending the Definition of Interconnected VoIP Service in Section 9.3 of the Commission's Rules*, 26 FCC Rcd. 10074 (2011).

BellSouth's "tax bounty hunter" argument is an unfair attack by an ultra-wealthy corporate conglomerate that shows a callous disregard for the life-saving mission of 911 districts.

II. INTEREST OF THE MADISON COUNTY COMMUNICATIONS DISTRICT

The MCCD is a legal subdivision of Madison County, Alabama formed pursuant to the ETSA.[4] The MCCD manages the delivery of 911 emergency services to residents of and visitors to the county. Like other 911 districts in Alabama, and many others throughout the country, the MCCD and its emergency services are funded by 911 charges. The ETSA makes telephone service providers billing and collection agents for 911 districts.[5] 911 districts depend almost entirely on service providers to secure their funding for operations by billing and collecting 911 charges in accordance with the ETSA.

The MCCD has its own history of litigation with BellSouth. In 2006, the MCCD sued BellSouth for breaching its duty under the ETSA to bill 911 charges on its traditional PRI service (the "*MCCD v. BellSouth* case").[6] BellSouth had a practice at that time of billing only five 911 charges per PRI even though its PRI service offered 23 voice channels that could simultaneously call 9-1-1.[7] It, therefore, comes as little surprise to the MCCD that BellSouth may have underbilled 911 charges to customers that received VoIP or similar service and seeks to avoid responsibility for the under-billing by (1) arguing that its customers did not receive VoIP service and (2)

---

[4] Alabama Code § 11-98-1, *et seq*.

[5] *Id*.

[6] *Madison Cty. Commc'ns Dist. v. BellSouth Telecomm., Inc.*, 5:06-CV-1786-CLS (N.D. Ala.).

[7] *Madison Cty. Commc'ns Dist. v. BellSouth Telecomm., Inc.*, 2009 WL 9087783, at *3 (N.D. Ala. Mar. 31, 2009) (Smith, J.) (finding that "[s]ince 1997 BellSouth has assessed service users of the Primary Rate ISDN service five E911 charges per Primary Rate ISDN interface").

disavowing its earlier statements that the ETSA required a 911 charge to be billed on every telephone number provided to VoIP customers.

III. BEFORE ARGUING PREEMPTION, BELLSOUTH INTERPRETED §5.1(C) OF THE ETSA LIKE THE ALABAMA 911 DISTRICTS

In its petition, BellSouth argues that 47 U.S.C. § 615a-1(f)(1) preempts the ETSA to the extent that the ETSA requires customers of VoIP service to be billed a 911 charge on every telephone number, while imposing 911 charges on access lines or voice channels for non-VoIP customers.[8] In the earlier *MCCD v. Bellsouth* case, however, BellSouth raised no such preemption concern when it interpreted the ETSA in the same way as the Alabama 911 Districts. Specifically, BellSouth argued to the court that "§ *11-98-5.1(c) requires a surcharge to be assessed on every ten-digit telephone number* . . . on VoIP or 'similar service(s).'"[9]

The federal court in Alabama (the same court presiding over the current case against BellSouth) agreed with BellSouth's position. In a Memorandum Opinion, it stated: "The court *agrees with BellSouth* that § 11–98–5.1 . . . imposes the E911 charge on each 10–digit telephone number provided to a user of VoIP or similar technology . . . ."[10]

Although BellSouth initially made its argument that VoIP is "assessed on every ten-digit telephone number" in 2007 (one-year before Congress passed § 615a-1), the federal court adopted

---

[8] BellSouth relies on the following language in section 615a-1: "the [911] fee or charge [to subscribers of interconnected VoIP services] may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services." *See BellSouth Petition* at p. 23.

[9] *See* Ex. A, BellSouth's Resp. in Opp. to Plaintiff's Motion for Partial Summary Judgment at p. 11 in *Madison Cty. Commc'ns Dist. v. BellSouth Telecomm., Inc.*, 5:06-CV-1786-CLS (N.D. Ala.) (emphasis added). BellSouth made this argument to counter the MCCD's contention that PRI service should be assessed 911 charges on a per-telephone number basis.

[10] *Madison Cty. Commc'ns Dist. v. BellSouth Telecomm., Inc.*, 2009 WL 9087783, at *8 n.43 (N.D. Ala. Mar. 31, 2009) (Smith, J.) (emphasis added).

BellSouth's position *after* § 615a-1 became effective. Bellsouth, however, did not raise its preemption concern at that time. In fact, it was not until over 7 years later, in response to the underlying lawsuit, that BellSouth informed anyone that it believed the ETSA's per-telephone number billing requirement was preempted by federal law. During that 7-year period, the MCCD and other 911 districts in Alabama relied on BellSouth's (and the Court's) interpretation of the 911 charge billing requirements for VoIP and similar service.

BellSouth and the federal court were not alone in understanding that the ETSA required a 911 charge on every active telephone number assigned to VoIP users. Alabama's 911 community had long-held the same view. Shortly after passage of § 5.l of the ETSA, the Alabama Chapter of the National Emergency Number Association ("NENA") briefed its members, including many 911 directors, on how 911 fees were to be billed for VoIP and similar services under the new statute. In its "Legislative Report," Alabama NENA told its members that "the law says that for VoIP and other similar services, *a surcharge will be collected for each 10-digit number activated*."[11]

Adopting BellSouth's preemption argument would also be at odds with the Commission's prior statements on funding for 911 service. In particular, the Commission observed in 2005 that "[b]ecause 911 contribution obligations are typically assessed on a per-line basis, states may need to explore other means of collecting an appropriate amount from competitive LECs on behalf of their interconnected VoIP partners, such as a per-subscriber basis."[12] The Alabama legislature's enactment of the "per-telephone-number" requirement for VoIP users in § 5.1(c) of the ETSA was in keeping with the Commission's suggestion to "explore other means of collecting" 911 charges

[11] *See* Ex. B, Minutes from 2005 3rd Quarter Chapter Meeting of Alabama NENA at ¶ 7 (emphasis added).

[12] First Report and Order and Notice of Proposed Rulemaking, *In the Matter of E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, n. 163 (2005) ("*VoIP 911 Order*").

for I-VoIP service.[13] The legislature passed an amendment that addressed the fact that VoIP service does not have "lines" and found a different and rational means of imposing 911 charges.

To the extent the Commission is inclined to find some preemptive effect from 47 U.S.C. § 615a-1, it should have only *prospective* application. Retroactive preemption would create chaos. 911 districts that relied on the "per-telephone-number" 911 charge requirement for VoIP could face demands from service providers and their customers for refunds of previously remitted 911 charges. It would also be entirely inequitable to allow BellSouth to receive retroactive benefit from a preemption ruling (particularly in light of its previous judicial statements) while other providers and their customers followed the ETSA's "per-telephone-number" requirement.[14]

Furthermore, BellSouth would likely make the same preemption argument if Alabama had adopted the Commission's specific suggestion of imposing 911 charges on a "per-subscriber basis."[15] That approach, like the per-telephone number approach of the ETSA, would surely not impose an identical amount of 911 charges on VoIP users and traditional exchange access line users.[16] Regardless, there should be no preemption here because Alabama applied the same 911 charge *rate* for VoIP and local exchange service. The fact that the number of 911 charges might differ for a VoIP customer versus a local exchange customer does not cause § 5.1(c) of the ETSA

---

[13] *VoIP 911 Order* at n.163.

[14] The Commission has observed: "[W]hether to permit retroactive application of an agency decision 'boils down to … a question grounded in notions of equity and fairness.' One relevant factor is whether there has been 'detrimental reliance on prior pronouncements by the Commission.'" *See* Order, *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457, ¶ 22 (2004) quoting *Cassell v. FCC*, 154 F. 3d 478, 486 (D.C. Cir. 1998) and *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001).

[15] *VoIP 911 Order* at n.163.

[16] The MCCD acknowledges that the Commission's suggestion in the *IP Enabled Order* pre-dates the adoption of section 615a-1.

to conflict with 47 U.S.C. § 615a-1. It is simply the product of VoIP being a different technology with different capabilities than local exchange service.

IV. BELLSOUTH SEEKS TO REWRITE THE COMMISSION'S I-VOIP RULE

BellSouth's Petition does not request an interpretation or application of Rule 9.3 defining I-VoIP. It seeks to impose a fundamental change—adding a fifth prong to the definition that would require the customer's contract or order to specify the delivery of VoIP service. BellSouth argues that the determining factor in the I-VoIP analysis is whether the customer ordered VoIP. In fact, BellSouth goes so far as to state that a service is ***not*** I-VoIP even if it meets all four requirements of the 9.3 definition as long as the customer's order speaks in terms of TDM or PRI service: "A provider's choice to fulfill a customer's order for a TDM voice service such as PRI by using IP to transmit the voice service over the last-mile facility does not cause that PRI service to require either the IP-compatible CPE or broadband connection that is used only as a result of that provider's unilateral decision."[17]

In BellSouth's view, as long as a provider calls the service something other than VoIP in the order form then it does not constitute I-VoIP even if the service, as delivered to the customer's premises, (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment (CPE); and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

[17] *BellSouth Petition* at p. 20. This sentence is not the only instance where BellSouth advocates for a new "customer order" approach. *See id*. at pp. 16, 20, and 21 ("the voice service the customer ordered remains non-VoIP service because that is what the customer ordered;" the use of IP was decided "by the provider rather than the customer that ordered the service;" and "when a customer orders a PRI service and the provider elects to send that voice service over the last mile in IP").

BellSouth contends that a service does not ***"require"*** IP-CPE and a broadband connection unless the customer specifically orders them. According to BellSouth, if it could have delivered the service in a way that does not require IP-CPE or a broadband connection, the service is not I-VoIP even though the method of delivery that BellSouth actually chose would not function without those elements.

To be more specific, BellSouth advocates for a rule where it delivers voice service over the last-mile into the customer's premises over IP, utilizing IP-CPE and a broadband connection, but the service would be TDM because BellSouth converts the voice from IP just inches before it reaches the customer's PBX. The voice never enters or leaves the customer's premises in TDM—always in IP. Nonetheless, the customer's "order" and those few inches of TDM transmission would, according to BellSouth, make the service TDM.

BellSouth's approach would be a major departure from Rule 9.3. The I-VoIP definition has never included a "customer order" analysis—with good reason. In reality, customer order forms often only specify the desired features of the service, not whether the voice traffic is ultimately to be transmitted or delivered in VoIP or TDM. The customer order could prove to be of little or no value in the analysis. Nonetheless, BellSouth would make the I-VoIP determination dependent on the customer's order (drafted by the provider). This new approach would render the four-part definition of 9.3 largely meaningless.

BellSouth's customer-order approach would also make it such that only the provider could determine whether a service constitutes I-VoIP. Even if the voice service delivery method required IP-CPE and a broadband connection, only the provider would know (1) if it made the "last second" conversion from IP to TDM and (2) the specifics of the customer's order. 911 districts and other

concerned parties could never independently assess whether a provider was delivering VoIP service.

BellSouth's position would likely require a significant modification to the Commission's Form 477 Instructions and Glossary. Those instructions provide a clear description of I-VoIP service as compared to local exchange service:

> Interconnected VoIP service uses IP packet format to transmit voice calls between the end-user customer's specialized equipment (such as an IP telephone, IP PBX, or TDM-to-IP converter device that is attached to an ordinary telephone or conventional PBX) and the telecommunications network. By contrast, local exchange telephone service uses analog or Time Division Multiplexing (TDM) to transmit voice calls between the end-user customer's device and the public switched telephone network.[18]

BellSouth's argument that "using IP to transmit the voice service over the last-mile facility does not cause that PRI service to require either the IP-compatible CPE or broadband connection" even if the method of delivery requires the IP-CPE and broadband appears to conflict with the 477 instructions. Moreover, if BellSouth's position were correct, then "the public switched telephone network" (as referred to in the Form 477 Instructions) would encompass the wiring inside the customer's premises all the way to an IP-to-TDM converter device sitting (potentially) in a closet in the interior of the customer's location. This interpretation seems completely at odds with the FCC's instructions.

The telecommunications industry has relied on the existing definition of I-VoIP and the Form 477 instructions for years. BellSouth's argument to scrap those existing definitions could create massive confusion: Must every customer order be reviewed to determine whether service is I-VoIP? What happens if the customer order does not specify VoIP or TDM but merely indicates

[18] https://transition.fcc.gov/form477/477inst.pdf at pp. 35–36.

the desired features of the service? Would providers need to amend 477 reporting to account for the new definition? Would 911 districts around the country be forced to refund 911 charges on service that was thought to be VoIP but, under the new BellSouth rule, no longer qualifies?

If the Commission is compelled to adopt BellSouth's customer order approach, it should acknowledge the fundamental shift and specify that its ruling has only prospective application. Retroactive effect would create far-reaching problems in the telecommunications industry.

V. THE 911 DISTRICTS' METHOD OF COMPENSATING THEIR AUDITOR IS BORN OF THE LACK OF FUNDING FOR 911 SERVICE AND IS OTHERWISE IRRELEVANT

BellSouth attempts to portray the Alabama 911 Districts' claims as being the bidding of Roger Schneider, which BellSouth describes as a "tax bounty hunter." This effort at distraction ignores two salient facts: (1) 911 districts do not typically have the financial resources to compensate qualified auditors on an hourly fee basis and (2) Mr. Schneider's audit expertise and passion for 911 grew out of his nearly 20 years of service on the MCCD's volunteer board for which he routinely performed 911 charge audits on a *pro bono* basis.

It is well publicized that the 911 community suffers from a lack of funding and needs substantial technological upgrades to keep pace with rapidly changing technology.[19] 911 districts

[19] See, generally, FCC *Annual Reports to Congress on State Collection and Distribution of 911 and Enhanced 911 Fees and Charges* at https://www.fcc.gov/general/911-fee-reports. The reports for the years 2015 through 2017 provide the following data about the costs of delivering 911 services versus 911 charges collected on a nationwide basis:

	Estimated Costs	Estimated 911 Charges Collected
2015:	$3,278,446,067.70	$2,631,705,009
2016:	$3,492,515,691	$2,763,916,948
2017:	$4,823,291,695	$2,937,108,459

See https://www.fcc.gov/files/eighthannual911feereport1217pdf;
https://www.fcc.gov/files/9thannual911feereportpdf;
https://www.fcc.gov/files/10thannual911feereporttocongresspdf.

in Alabama and elsewhere need to enforce existing laws to help ensure adequate funding. Unfortunately, limited 911 agency budgets rarely allow for hourly-fee audits to determine whether the proliferating number of service providers are actually complying with their 911 funding obligations. Therefore, 911 agencies must look for other options which, in this case, meant hiring an auditor willing to be compensated based on monetary recoveries from the audits. Without such a contingent-fee arrangement, most 911 districts would be forced to simply hope for compliance without oversight.

Roger Schneider, the auditor engaged by the Alabama 911 Districts, has a long history with the 911 community. He served on the MCCD's volunteer board for nearly 20 years. In that role, he conducted numerous audits of service providers on behalf of the MCCD without compensation. That work led to several recoveries from service providers that had not billed and collected 911 charges in accordance with the ETSA. Other 911 districts in Alabama learned of Mr. Schneider's audit work and asked him to assist them with their own audits. Mr. Schneider's willingness to perform audits for other 911 districts on a contingent-fee basis and to assist in compliance efforts may make him unpopular with BellSouth and other providers but does not serve as a basis to grant BellSouth's petition.

VI. CONCLUSION

BellSouth's petition seeks major changes in FCC rules and federal court precedent that would fundamentally alter the landscape of telephony that would greatly undermine an already inadequate funding mechanism for 911 emergency services. If the Commission finds merit with any of BellSouth's positions, it should make its ruling prospective only. Retroactive application of BellSouth's proposals would destabilize 911 agencies and potentially invalidate the statutory 911 funding framework in states throughout the nation.

/s/ *Ernie Blair*_____

Chief Executive Officer
Madison County, Communications District
5827 Oakwood Road NW
Huntsville, Alabama 35806-1529
256-722-7341
eblair@madco911.com

Exhibit A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

MADISON COUNTY COMMUNICATIONS DISTRICT,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 5:06-CV-1786-CLS**
BELLSOUTH TELECOMMUNICATIONS, INC.,	)	
Defendant.	)	

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

CARL S. BURKHALTER
BONNIE BRANUM MONROE
Attorneys for Defendant BellSouth Telecommunications, Inc.
MAYNARD, COOPER & GALE, P.C.
Suite 2400 Regions Harbert Plaza
1901 Sixth Avenue, North
Birmingham, Alabama 35203-2602
Telephone: (205) 254-1000
Telecopier: (205) 254-1999

TABLE OF CONTENTS

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant BellSouth, Inc. ("BellSouth" or "Defendant") hereby submits its Response in Opposition to the Motion for Partial Summary Judgment of Plaintiff Madison County Communications District ("MCCD"). For the reasons set forth herein, MCCD is not entitled to summary judgment on its claims for declaratory relief, negligence, breach of fiduciary duty, and injunctive relief

Defendant respectfully requests oral argument on its Opposition to Plaintiff's Motion.

INTRODUCTION

This case turns on the interpretation of the Alabama Emergency Telephone Service Act ("Act"), ALA. CODE §§ 11-98-1 *et seq*. The issue in this case is how to treat certain channelized services for purposes of assessing the 911 surcharge ("surcharge") provided for in the Act.

As Plaintiff states, this is a question of law that could easily be decided by the Court on summary judgment. Plaintiff, however, invites this Court to stretch the plain and ordinary words of the Act far beyond what the Legislature intended to require BellSouth to assess the surcharge on these channelized services on the basis of ten-digit access numbers. Plaintiff's interpretation is flawed because the Act provides another basis on which to assess the surcharge – on exchange access lines, that is. ALA. CODE § 11-98-5(c). The surcharge should only be assessed on

the basis of ten-digit access numbers in the case of Voice Over Internet Protocol ("VoIP") and its "similar services." *Id.* at § 11-98-5.1(c). As discussed fully herein, the channelized services at issue in this case are not similar to VoIP. Furthermore, contrary to the principles of statutory interpretation, Plaintiff's interpretation would lead to an absurd result, particularly in the case of Primary Rate ISDN ("PRISDN"), which is the main product at issue in this case.

RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS

For the purposes of disputing MCCD's characterization of the facts, Defendant states as follows:

8. Defendant disputes this characterization of Mr. Brenizer's testimony.

10. This statement is true only if the PRISDN customer provisions all 23 B-channels for voice delivery. (Plaintiff's Exhibit I at 48-50).

12. BellSouth disputes this statement. Instead, "[t]he required components for BellSouth Primary Rate ISDN are as follows: BellSouth Primary Rate ISDN Access Line where applicable; Interoffice Channels where applicable; BellSouth Primary Rate ISDN Interface; BellSouth Primary Rate ISDN B-Channels; BellSouth Primary Rate ISDN D-Channel; Telephone Numbers; Call Types." (Defendant's Exhibit 9 at 1).

13. The use of "the line" is ambiguous and BellSouth therefore denies this statement. However, BellSouth admits that PRISDN B-channels transmit voice and data over an access line. (Plaintiff's Exhibit K at A42.3.1.B, p. 1).

17. Denied. A BellSouth PRISDN customer *could*, but does not necessarily, receive a ten-digit number for each of its B-channels activated for voice calls. (Plaintiff's Exhibit H at 94-95; Defendant's Exhibit 16 at ¶ 5).[1] Only one telephone number is required for the service, although a customer may purchase as many telephone numbers as he or she deems necessary. *Id.* at ¶¶ 5, 7.

20. Denied. A PRISDN interface "provides multiplexing to support up to 23 B-channels…. One BellSouth Primary Rate ISDN Interface is required for each BellSouth Primary Rate ISDN Access Line." (Plaintiff's Exhibit K at A42.3.3, p. 2).

34. Denied. Centrex ISDN supports transmission of voice, data, and packet services on the same exchange access line. (Plaintiff's Exhibit R at A12.26.1.A, p. 1). Centrex ISDN provides access to the telephone network through a Basic Rate Digital Subscriber Line Access Arrangement. *Id.*

[1] For ease of reference, BellSouth's exhibits to this Opposition will start at Exhibit 16 because BellSouth Exhibits 1-15 were attached to its Motion for Summary Judgment.

35. Denied, although BellSouth admits that a Basic Rate Digital Subscriber Line Access Arrangement will allow transmission of voice, data, and packet services on one or two B-channels. *Id.*

51. MegaLink Channel Service is not at issue in this lawsuit. Plaintiff's Complaint and Amended Complaint make no mention of the service. *See generally* Complaint and Amended Complaint.

52. *See* BellSouth's Response to Plaintiff's Narrative Summary of Undisputed Facts.

55. A VoIP call travels over the PSTN *only* when it terminates to a PSTN customer or originates with a PSTN customer. (Defendant's Exhibit 17; Plaintiff's Exhibit I at 66).

ADDITIONAL UNDISPUTED FACTS

1. Under the Act as it was drafted in 1984, "[a]n emergency telephone service charge shall be imposed only upon the amount received from the tariff rate for exchange access lines." ALA. CODE § 11-98-5(c).

2. The Act was amended in 2005. The amended section provides that the surcharge shall be assessed on each ten-digit access number for "VoIP or similar services." ALA. CODE § 11-98-5.1(c).

3. There is no correlation between the number (or quantity) of B-channels used through the PRISDN service and number (or quantity) of ten-digit access numbers a customer may purchase under that service. Only one ten-digit number is required when ordering PRISDN service, regardless of the number of B-channels the customer has purchased. (Defendant's Exhibit 16 at ¶¶ 5, 7).

4. A PRISDN customer can order more ten-digit numbers than the number of B-channels they have activated for voice calls. (Plaintiff's Exhibit H at 95).

5. For example, a PRISDN customer may have 1,000 ten-digit numbers for 23 B-channels activated for voice calls. (Defendant's Exhibit 16 at ¶ 8).

6. Conversely, a customer may have only one ten-digit number for 23 B-channels which have been activated for voice calls. *Id.*

7. Although MCCD includes allegations regarding MegaLink Channel Service ("MegaLink") in its motion for summary judgment, it is not at issue in this case. MegaLink ("MegaLink") is not mentioned anywhere in the Complaint or First Amended Complaint. *See generally* Complaint and First Amended Complaint.

8. MegaLink is a distinct service from Channelized Trunks, and has its own pricing structure and own tariff section. (Plaintiff's Exhibit N at 9-10, 23-24, 25-28, 34-35).

9. In contrast to the channelized services at issue, which are circuit-switched technologies, VoIP is a packet-switched technology. (Defendant's Exhibit 17; Defendant's Exhibit 4 at ¶¶ 26-27).

10. A voice call that originates over VoIP technology can bypass the Public Switched Telephone Network. (Plaintiff's Exhibit I at 66; Plaintiff's Exhibit H at 121).

11. A voice call made over VoIP does not necessarily need to move over a physical line or wire. (Plaintiff's Exhibit I at 64-65). The voice call could be transmitted from a wireless access point. (Plaintiff's Exhibit H at 123-24).

12. MCCD operates a "state-of-the art" 911 facility. (Plaintiff's Exhibit F at 83:20).

13. MCCD houses call-takers and dispatchers for the following agencies: Madison County Sheriff's Department, Huntsville Police Department, City of Madison Police Department, City of Madison Fire Department, City of Madison Fire Department, Madison County Fire Department, Huntsville Fire and Rescue

Department, and Huntsville Emergency Medical Service, Inc. (Plaintiff's Exhibit F at 24:8-25:12).

14. The agencies listed in the prior paragraph do not pay rent to MCCD for the use of its facility. *Id.* at 53:5-19.

15. MCCD is also responsible for equipment purchases and maintenance for said agencies. *Id.* at 49:1-5, 48:19-49:17, 52-53.

16. MCCD employs eighteen of its own call-takers in three positions. *Id.* at 18-19.

17. It is unusual for a 911 call to MCCD to ring three times before it is answered. *Id.* at 48.

18. MCCD owns its facility and the land on which it sits "free and clear." *Id.* at 81:16-23.

19. MCCD had retained earnings of $4,919,798 as of September 2006. This includes $1,200,000 in certificates of deposit. *Id.* at 77-78; Defendant's Exhibit 6 at MCCD 2025.

20. On an EBITDA basis, MCCD has been profitable every fiscal year from 1995 through 2006. (Defendant's Exhibit 4 at ¶ 52).

21. In a November 12, 2003 letter to BellSouth, MCCD stated as follows: "[T]he District believes that a separate charge is required for each line or voice path capable of simultaneous 9-1-1 service." (MCCD 2124-25; Defendant's Exhibit 24.)

LEGAL ARGUMENT

I. MegaLink is not at issue in this case.

As a preliminary matter, although MCCD mentions BellSouth's MegaLink service in its Motion for Summary Judgment, MegaLink is not at issue in this case. Plaintiff's Complaint and Amended Complaint make allegations regarding PRISDN, Business – ISDN ("BRI"), Centrex ISDN, and Channelized Trunks.[2] *See generally* Complaint and Amended Complaint. There is no mention whatsoever of MegaLink. *Id.* Indeed, MCCD's Motion for Partial Summary Judgment is the first pleading in which MegaLink is referenced.

MegaLink is a distinct BellSouth service. It is not the same service as BellSouth Channelized Trunks or the other services mentioned in Plaintiff's pleadings. For example, MegaLink has its own section in the General Exchange Price List, and its own pricing structure. (Plaintiff's Exhibit N at 25-28).

[2] Plaintiff also states claims based on BellSouth's Centrex IP service; however, there are no subscribers to this service in Madison County. (Defendant's Exhibit 3 at Nos. 10-13). Therefore, summary judgment should be entered against Plaintiff with respect to that service.

MegaLink, which provides for both voice and data transport, is also functionally different from Channelized Trunks, which is a voice-only service. *Id.* at 23-24.

For these reasons, the Court should disregard any reference to MegaLink in MCCD's Motion.

II. MCCD's interpretation of the Act is incorrect; therefore, it is not entitled to summary judgment on its claim for declaratory relief.

MCCD's claim for declaratory relief turns on the interpretation of the Act. MCCD contends that the Act requires BellSouth to "assess and remit the E911 charge on every 10-digit telephone number in Madison County . . . ." (Plaintiff's Brief at 1). Such an interpretation would be inconsistent with the Act's plain language and, particularly in the case of PRISDN, would yield an absurd result.

In determining the meaning of a statute, a court should look to the plain meaning of the words as written by the legislature. *Blue Cross & Blue Shield v. Nielsen*, 714 So.2d 293, 296 (Ala.1998) (quoting *IMED Corp. v. Systems Eng'g Assocs. Corp.*, 602 So.2d 344, 346 (Ala.1992)). The Alabama Supreme Court has stated:

> It is true that when looking at a statute we might sometimes think that the ramifications of the words are inefficient or unusual. However, it is our job to say what the law is, not to say what it should be. Therefore, only if there is no rational way to interpret the words as stated will we look beyond those words to determine legislative

> intent. To apply a different policy would turn this Court into a legislative body, and doing that, of course, would be utterly inconsistent with the doctrine of separation of powers.

Munnerlyn v. Alabama Dept. of Corrections, 946 So.2d 436, 438-39 (Ala. 2006) (citing *Ex parte T.B.*, 698 So.2d 127, 130 (Ala.1997)).

MCCD's interpretation ignores the plain language of the Act. The Act, which was adopted in 1984, provides that the surcharge should be assessed "upon the amount received from the tariff rate for *exchange access lines*." ALA. CODE § 11-98-5(c). In fact, one of Plaintiff's undisputed facts is that Madison County voters authorized a surcharge "on *tariff rate exchange access lines*." (Plaintiff's Brief at 2, ¶ 5) (emphasis added). The 2005 amendment to the Act provides that "each provider of VoIP or similar service" shall collect the surcharge "for each ten-digit access number assigned to the user and to remit such fee as provided in Section 11-98-5." *Id.* at 11-98-5.1(c). Under the language of the Act as amended, the surcharge should be applied to an exchange access line **or** to a ten-digit access number, depending on the kind of service at issue. MCCD's interpretation of the Act would require a local exchange carrier, such as BellSouth, to assess the surcharge on ten-digit access numbers associated with all services, not just those services similar to VoIP. Its interpretation essentially blurs the distinction between §§ 11-98-5(c) and 11-98-5.1(c). The amendment in § 11-98-5.1(c) clarifies an

issue not previously addressed by the statute – *i.e.*, how to assess the surcharge on VoIP or similar technology. Had the Legislature intended § 11-98-5.1(c) to change the way the surcharge is assessed on all services, it would have repealed, rather than amended, § 11-98-5 of the Act. Instead, the Legislature wrote the Act to give effect to both sections.

As such, § 11-98-5.1(c) requires a surcharge to be assessed on every ten-digit telephone number only on VoIP or "similar service(s)." It is undisputed that VoIP is not similar to the services at issue. (Plaintiff's Exhibit M at 48). VoIP is a technology that allows one to make telephone calls over the Internet using hardware the customer has purchased for Internet service. (Plaintiff's Exhibit I at 63-64). VoIP subscribers purchase a broadband connection that is not channelized in any way, unlike each of the services at issue in this case. (Plaintiff's Exhibit H at 121). VoIP operates on a completely separate broadband network from the channelized services at issue. (Defendant's Exhibit 17). When a VoIP subscriber places a voice call, the call bypasses the Public Switched Telephone Network ("PSTN") on the access end of the connection. *Id*; Plaintiff's Exhibit I at 66; Defendant's Exhibit 4 at ¶ 28. The call only travels through the PSTN if the person to whom the call is directed is a PSTN customer. *Id.*; Plaintiff's Exhibit H at 121-22; Defendant's Exhibit 4 at ¶ 28. In order to access the PSTN, VoIP must use a special piece of hardware called a gateway. (Defendant's Exhibit 17). Ordinary

PSTN calls, and calls using PRISDN and similar services, do not require use of a gateway. Instead, the channelized services at issue offer a direct interface into the switching network. (Plaintiff's Exhibit I at 10-11). Furthermore, VoIP technology does not require a traditional line in order to transmit a voice call; a VoIP call can be placed wirelessly. (Plaintiff's Exhibit I at 64-65). Finally, VoIP uses Internet Protocol to perform *packet* switching, while PRISDN uses Time Division Multiplexing technology to perform *circuit* switching.[3] (Defendant's Exhibit 17; Defendant's Exhibit 4 at ¶¶ 25, 27-28).

The distinctive nature of VoIP explains why VoIP surcharges are collected on the basis of ten-digit numbers. A voice call made by a VoIP subscriber takes place over a broadband network connection such as an internet access or television cable, instead of using a dedicated access line, to connect to a telephone company. (Defendant's Exhibit 4 at ¶¶ 28, 30). Because such a connection is not to a public switched network access line, there would have been no opportunity to collect a

[3] Even if the Court were to determine that the surcharge should be applied per ten-digit access number, which it should not, MCCD would be limited to damages from May 5, 2005 forward because the VoIP amendment to ALA. CODE § 11-98-5.1 was passed on that date. Before that time, the Act included no reference whatsoever to ten-digit access numbers. *See generally* ALA. CODE §§ 11-98-1 – 11-98-5. Nor can the statute be read to apply retroactively. *See Riley v. Kennedy*, 928 So.2d 1013, 1016, (Ala. 2005) (citing SUTHERLAND STAT. CONST., § 41.04 (4th ed 1984); *Dennis v. Pendley*, 518 So.2d 688, 690 (Ala.1987)) ("Statutes are to be prospective only, unless clearly indicated by the legislature. Retrospective legislation is not favored by the courts, and statutes will not be construed as retrospective unless the language used in the enactment of the statute is so clear that there is no other possible construction.").

surcharge on a customer's use of VoIP telephone service prior to the 2005 amendment to the Act. *Id.* at ¶ 30. Because VoIP subscribers had 911 calling capabilities, the Legislature had to create a way for 911 districts, such as MCCD, to collect a surcharges from them. *See id.* VoIP subscribers require a ten-digit access number only if they plan to use the service to interconnect with the switched telephone network. *Id.* at ¶ 28. Because the surcharge could not be assessed on the basis of a line for the VoIP technology, it was logical for the Legislature to assess the surcharge on the basis of a ten-digit number on VoIP and "similar services." There was essentially no other basis on which to collect a surcharge for VoIP. In contrast, there is another basis on which to collect a surcharge on the channelized services at issue – that is, on exchange access lines. ALA. CODE § 11-98-5(c).

MCCD argues that BellSouth's interpretation of the Act – that § 11-98-5.1(c) applies only to VoIP or similar services – is "fundamentally flawed" because it "ignores the requirement of the Act that the 'service charge shall have uniform application'." (Plaintiff's Brief at 22 (citing ALA. CODE § 11-98-5(a)(1)). MCCD bases its assertion on the fact that BellSouth's interpretation would cause VoIP and similar service users and non-VoIP users to pay the surcharge on different bases.[4] *Id.* MCCD, however, misinterprets the Act's requirement that the "service charge shall have uniform application." ALA. CODE § 11-98-5(a)(1).

[4] BellSouth submits that this is *exactly* what the Act requires. *See* discussion, *supra.*

The Act defines uniform application as "[t]he rate to be charged or applied by the communication district to the exchange access rate charged to business and residential access lines." ALA. CODE § 11-98-1(10). As reflected by its statutory definition, "uniform application" refers to the requirement that the surcharge shall be the same percentage for both business and residential customers. MCCD assesses the surcharge at a rate of five percent of the maximum tariff rate charged by any service supplier in the district. Under § 11-98-5(a)(1), the rate charged – five percent – must apply to both residential *and* business customers. MCCD could not, for example, assess a surcharge of five percent of the tariff rate for residential customers and two percent of the tariff rate for business customers. In the past, MCCD has adjusted its rates charged to business and residential subscribers in order to comply with this requirement. *See* Defendant's Exhibits 18, 19, and 20. MCCD is thus well aware what "uniform application" means.

The laundry list of problems with MCCD's theory does not stop there. MCCD's interpretation of the Act incorrectly assumes that lines or communication paths always correspond to ten-digit access numbers. This is simply not the case. A PRISDN customer with 23 channels activated for voice calls may purchase any number of ten-digit access numbers – either more or less than the 23 channels provisioned for voice. (Defendant's Exhibit 16 at ¶ 7; Plaintiff's Exhibit H at 94-95, 97). For example, a customer with 23 voice channels may purchase 1,000

telephone numbers. (Defendant's Exhibit 16 at ¶ 8). Conversely, a customer may purchase only one telephone number for its 23 voice-capable channels. *Id.* What is more, the same customer with 1,000 ten-digit numbers for 23 channels *may have no outward voice capability at all.* *Id.* at ¶ 9. There simply is no relationship between ten-digit numbers and a customer's ability to dial 911. (Plaintiff's Exhibit H at 97).

The disconnect between channels and ten-digit access numbers is hardly news to MCCD. MCCD's expert, Gary Lavender, prepared two different damages calculations: The first is an estimate of MCCD's damages if the surcharge is to be assessed per ten-digit access number, while the second estimates MCCD's damages if the surcharge is assessed on a per-channel basis. (Plaintiff's Exhibit HH; Defendant's Exhibit 21). The calculation based on ten-digit access numbers is *almost three times the calculation based on the channels.* *Compare* Plaintiff's Exhibit HH and Defendant's Exhibit 21. If accurate, Mr. Lavender's calculations prove the absurdity of basing the surcharge on ten-digit access numbers for these services.

Moreover, MCCD has not even been consistent in its own interpretation of the Act. In a 2003 letter to BellSouth, MCCD took the position that "a separate charge is required for each line or voice path capable of simultaneous 9-1-1

service." (Defendant's Exhibit 24.) As noted above, this position is quite different from the contention that a surcharge should be imposed on every ten-digit phone number. In its original Complaint, MCCD again argued that surcharges should be based on voice lines or paths, not on phone numbers:

> The correct interpretation of the applicable statutes is that BellSouth has a duty and obligation to collect said charges for each voice capable line provided to its customers, if such lines could be utilized separately and simultaneously by the subscriber to access MCCD's PSAP by dialing 9-1-1, subject to the statutory limitation of 100 lines or units of service per person per location.

Complaint ¶ 19. Similarly, in MCCD's Rule 30(b)(6) deposition, MCCD's director, Ernie Blair, testified that the Act required BellSouth to collect a surcharge per channel or per voice path to 911. (Plaintiff's Exhibit F at 88-89). MCCD alleged the same thing in its Amended Complaint, but also alleged *in the alternative* that:

> ...[I]f the Court determines that the services referenced above are "similar services" in relation to Voice Over Internet Protocol (VoIP), then the correct interpretation is that BellSouth has a duty to collect the emergency telephone service charge for each ten-digit access number assigned to the service user and to remit such charge to MCCD.

Amended Complaint ¶ 74. MCCD's current interpretation ties the surcharge exclusively to ten-digit access numbers because, it assumes, the numbers identify

paths to 911.[5] But as noted above, that assumption is misplaced. Each ten-digit number does not necessarily identify a distinct voice path or channel; one channel can (and often does) support multiple ten-digit numbers. And many ten-digit numbers are provisioned for inward-dialing only, meaning they cannot be used to dial 911.

III. Even if MCCD's interpretation of the Act is correct, it is not entitled to summary judgment because a question of fact exists as to whether MCCD is adequately funded.

Even if this Court determines that the surcharge should be assessed on each ten-digit access number, it still should not enter summary judgment in MCCD's favor because, *at worst*, a question of fact exists as to whether MCCD is adequately funded.[6]

The Act does not permit a 911 district to collect more surcharges than are "necessary to fund the district." ALA. CODE § 11-98-5(b). In fact, it specifically

[5] MCCD also contends that its interpretation "is supported by the custom and practice of the industry." (Plaintiff's Brief at 21). MCCD bases this argument on the findings of its expert, Gary Lavender, who audited numerous other local exchange carriers and, according to MCCD, concluded that all of them – except for BellSouth – collect the surcharge on the basis of ten-digit access numbers. *Id.* The data on which Mr. Lavender relies, however, is inadmissible hearsay, coming as it does from third parties through unsworn statements. In any event, and in the alternative, documents provided by Mr. Lavender to BellSouth reflect that many of these local exchange carriers collect the surcharge on the basis of channels, rather than ten-digit access numbers. (Excerpts from Mr. Lavender's records are attached hereto as Defendant's Exhibit 23).

[6] As discussed in BellSouth's motion for summary judgment, BellSouth is entitled to summary judgment because the evidence – including MCCD's own admissions – clearly establishes that MCCD is adequately funded. (BellSouth's Motion for Summary Judgment at 16-19). But if for some reason the Court rejects that argument, the Court surely must conclude, at minimum, that there is a genuine dispute about whether Plaintiff is adequately funded, in which case Plaintiff would not be entitled to summary judgment.

provides that if the proceeds from the surcharge exceed the amount necessary to provide 911 services, the surcharge should be reduced or completely suspended. *Id.* Accordingly, if BellSouth's manner of collecting the surcharge has provided MCCD with sufficient funds to provide 911 services to residents in Madison County, it cannot recover against BellSouth for uncollected surcharges. This is true regardless of whether MCCD's interpretation of the Act is correct.

At the very least, there is an issue of fact as to whether MCCD is adequately funded. MCCD's "state-of-the-art" facility is the largest in the state. (Plaintiff's Exhibit F at 83:20-21). It owns the building and the land on which it sits "free and clear. *Id.* at 18. MCCD employs eighteen call-takers in three positions. *Id.* at 18-19. It is "very unusual" for a 911 call to ring three times before being answered by one of these call-takers. *Id.* at 48. In addition, MCCD has purchased automobiles for four of its employees. *Id.* at 80:19-81:6.

MCCD houses and provides equipment for the police, fire, and ambulance agencies of Madison County, the City of Huntsville, and the City of Madison. *Id.* at 24-25. MCCD does so without charging these agencies one penny for rent or equipment purchase and maintenance. *Id.* at 49.

Even with all of this, MCCD still has money in the bank. It has retained earnings of almost five million dollars, including approximately $1,200,000 in

certificates of deposit. *See id.* at 77-78; Defendant's Exhibit 6 at MCCD 2025. On an EBITDA basis, MCCD has been profitable for each of the last thirteen years.[7] (Defendant's Exhibit 4 at ¶ 52).

The evidence demonstrates that MCCD's provision of 911 services has not been deficient in any way and that it has suffered no financial limitations in its ability to provide these services. As such, allowing an award in MCCD's favor, even if it is correct in its interpretation of the Act, would violate the express terms of the Act.

IV. MCCD is not entitled to summary judgment on its negligence and breach of fiduciary duty claims.

MCCD alleges that BellSouth breached a duty owed to MCCD by not collecting the surcharge "for each line or communication path identified by a [ten]-digit access number assigned to the service user." (Plaintiff's Brief at 26). Therefore, MCCD alleges, it is entitled to summary judgment on its negligence and breach of fiduciary duty claims. At the outset, it should be noted that summary judgment is rarely appropriate as to a claim for negligence. *Hunt v. Atrex, Inc.*, No. 2050824, 2007 WL 548802 at *2 (Ala.Civ.App. Feb. 23, 2007) (citing *Nunnelee v. City of Decatur*, 643 So.2d 543 (Ala.1993)). Even if the court determines that a duty exists as a matter of law, questions of breach, proximate

[7] *See* BellSouth's Motion for Summary Judgment at 16-19 for further discussion.

cause, and damages are normally questions of fact for the jury. *See Jones Food Co., Inc. v. Shipman*, No. 1051322, 2006 WL 3718254 at *5 (Ala. Dec. 15, 2006). A breach of fiduciary duty claim would carry the same questions of fact.

This case does not fall outside the rule that summary judgment on a negligence claim is rarely appropriate. A question of fact exists as to whether BellSouth breached a duty owed MCCD by unreasonably interpreting the Act. *See Stevens v. Stanford*, 766 So.2d 849 (Ala.Civ.App. 1999) (noting that negligence is described as the omission to do something that a reasonable person would do, or something that a reasonable person would not do). BellSouth submits that it properly interpreted the Act; therefore, it cannot be liable to MCCD. However, even if MCCD's interpretation is correct, the evidence suggests that BellSouth's interpretation was reasonable in light of the circumstances.

MCCD admits that the Act is not a "paragon of clarity." (Plaintiff's Exhibit F at 119; Defendant's Exhibit 22). And, as previously discussed, MCCD itself has changed its interpretation of the Act during this litigation. In spite of this, MCCD alleges that BellSouth should have known that the Act requires it to assess the surcharge on ten-digit access numbers. If the Act is unclear as MCCD says, it is reasonable – and certainly non-negligent – for BellSouth to tie the surcharge to "exchange access lines," given the language of the Act. ALA. CODE § 11-98-5(c)

("An emergency telephone service charge shall be imposed only upon the amount received from the tariff rate for exchange access lines."). Furthermore, because VoIP is not similar to the channelized services at issue, it is easy to understand why BellSouth would not apply the surcharge on ten-digit access numbers. This is particularly true in the case of the PRISDN service, where there is no correlation between lines or paths and ten-digit access numbers.[8]

Furthermore, as discussed in Section III above, a question of fact exists as to whether MCCD has been damaged. Accordingly, MCCD's Motion should be denied with respect to its claims for negligence and breach of fiduciary duty.

A. MCCD's is not entitled to summary judgment on its breach of fiduciary duty claim because no fiduciary relationship exists.

MCCD's motion as to its claim for breach of fiduciary duty should be denied for the additional reason that there is no fiduciary relationship between MCCD and BellSouth under these circumstances. Whether a fiduciary relationship exists is a question of law that depends upon the following factors: (1) the relationship of the parties; (2) the relative knowledge of the parties; (3) the value of the particular fact; (4) the plaintiff's opportunity to ascertain the fact; (5) the customs of the trade; and (6) other relevant circumstances. *Platt v. ERA Marie McConnell Realty, Inc.*, 774 So.2d 577, 583 (Ala. Civ. App. 1999) *rev'd and remanded on other*

[8] *See also* BellSouth's Motion for Summary Judgment at 27-28 for a discussion of why the five-line approach is reasonable.

grounds, 774 So.2d 588 (Ala. 2000). The issue is whether BellSouth improperly interpreted the Act, not whether it actually collected and remitted the surcharge correctly. *See* Plaintiff's Exhibit F at 166-167. MCCD has been aware of BellSouth's interpretation of the Act since 2002. (Defendant's Exhibit 7; Plaintiff's Exhibit F at 164:10-20; 164:21-23). Even before that time, MCCD had opportunity to inquire about BellSouth's policy with respect to the surcharge assessment. Contrary to most situations in which a fiduciary relationship is determined to exist, BellSouth has no superior knowledge over MCCD with respect to its policy. *Platt*, 774 So.2d at 582-83.

V. MCCD is not entitled to summary judgment on its claim for injunctive relief.

As MCCD points out in its motion, the elements required for injunctive relief are as follows: success on the merits, a substantial threat of irreparable injury if the injunction is not granted, the threatened injury to the plaintiff outweighs the harm the injunction may cause the defendant, and granting the injunction will not disserve the public interest. (Plaintiff's Brief at 28) (citing *Clark Constr. Co. v. Pena*, 930 F.Supp. 1470, 1477 (M.D. Ala. 1996); *TFT v. Warning Sys., Inc.*, 751 So.2d 1238, 1242 (Ala. 1999)). MCCD is not entitled to summary judgment on this claim because it has not satisfied all of the necessary elements.

As discussed herein, MCCD's interpretation of the Act conflicts with its plain language, and leads to absurd results, particularly in the case of PRISDN. Moreover, the channelized services at issue are not similar to VoIP. Therefore, MCCD cannot establish the likelihood of success on the merits.

Furthermore, because a question of fact exists as to whether MCCD is adequately funded, MCCD has not proved that a substantial threat of injury exists if the injunction is not granted. MCCD has not shown that it has suffered harm under the terms of the Act, which does not permit a 911 district to collect more surcharges than "necessary to fund the district." ALA. CODE § 11-98-5(b).

MCCD also argues that the issuance of permanent injunctive relief will serve the public interest by "providing the funds needed to provide emergency aid to the public" through 911 districts such as MCCD. (Plaintiff's Brief at 30). Again, MCCD has not shown that the funds received from the surcharge collected have been insufficient to operate its facility. Instead, the evidence suggests that MCCD has a "state-of-the-art" facility at which 911 calls are answered quickly and efficiently and that it is more than adequately funded.

CONCLUSION

For the foregoing reasons, Defendant asks that Plaintiff's Motion for Summary Judgment be denied in its entirety.

CARL S. BURKHALTER
BONNIE BRANUM MONROE
Attorneys for Defendant BellSouth
Telecommunications, Inc.

OF COUNSEL:

MAYNARD, COOPER & GALE, P.C.
Attorneys at Law
Suite 2400 Regions Harbert Plaza
1901 Sixth Avenue, North
Birmingham, Alabama 35203-2602
Telephone: (205) 254-1000
Telecopier: (205) 254-1999

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Mr. John E. Goodman
BRADLEY ARANT ROSE & WHITE, LLP
One Federal Place
1819 Fifth Avenue, North
Birmingham, Alabama 35203

Mr. Daniel Kaufmann
BRADLEY ARANT ROSE & WHITE, LLP
200 Clinton Avenue West, Suite 900
Huntsville, Alabama 35801-4900

Bonnie B. Monroe
OF COUNSEL

Exhibit B

Alabama Chapter of the National Emergency Number Association (NENA)

July 28, 2005

Minutes – AL NENA 3rd Quarter Chapter Meeting

Location – Kiwanis Pavilion, Attalla, AL
Host – Etowah County E911

1. Meeting called to order – Bill Brodeur
   A. Invocation and Pledge of Allegiance – Art Faulkner

2 Welcome – Sen. Larry Means
   Bill Brodeur - President

3. Announcements – Bill Brodeur
   A. Bill Brodeur announced the passing of Richard Holt and Jo Tranter. He mentioned that Jo had not gotten an opening speaker for the Annual Conference. Bill suggested doing a tribute to Richard and Jo at the conference and requested every member submit pictures they have of Richard or Jo.

4 Review and Approval of April 28, 2005 Minutes - No discussion
   Motion to approve – Art Faulkner
   Second – Roger Wilson
   Motion Carried

5 Financial report – Roger Humphrey – Treasurer – Roger reviewed the financial report.
   Motion to approve Financial Report – Roger Wilson
   Second – Donnie Smith
   Motion carried – Financial Report Approved

6. Jason Barber - Bill Brodeur announced that Jason Barber was elected 2nd Vice President of National NENA, and that Jason had called him expressing appreciation for the overwhelming support from the Alabama Chapter. Jason also offered assistance in the event Hurricane Dennis damaged Alabama.

7 Legislative Report – Roger Wilson. Roger advised they were unsuccessful in getting the wireless surcharge changed in the 2005 legislative session. NENA had to refocus upon notification of the BellSouth Deregulation bill. There was concern that some language in the BellSouth bill could have a negative impact on wireline surcharge collections and they began working with Sonny Brasfield to protect the wireline surcharge. They were successful and also had language added to impose an E911 surcharge on VoIP providers in Alabama. Roger advised that all ECD's need to send a letter to all VoIP carriers instructing them to collect and remit the correct surcharge. He advised the law says that for VoIP and other similar services, a surcharge will be collected for each 10-digit number activated. He further advised that all ECD's need to consider levelizing on a bundled wireline service if they have not already done so. He said efforts

continue to improve funding from wireless, and that all ECD's will benefit from the success in the 2005 legislative session.

8. Managerial Training for 2005 – Bill Brodeur reported that since the death of Jo Tranter, a volunteer was needed to manage the Managerial Training program

9 Minimum Dispatch Standards – Bill Brodeur stated that Richard Holt and Jo Tranter were both involved in the Minimum Dispatch Standards effort, and since both had passes away, Roger Humphrey had been appointed to the minimum standards committee. Roger reported no funding source has been located and little further can be done to establish minimum dispatch standards. Bill asked Helen Smith, AL APCO President to brief the membership on APCO training. Helen advised the next class was August 9, 2005 at the Holiday Inn East, Montgomery. The subject of the class is Meth Labs and the cost is $50.00 per attendee payable to Chilton County E911.

10 Conference Report 2005 – Bill Brodeur advised that he had accepted Conference Chair due to the death of Jo Tranter. He is having all registration for the annual conference sent to him. Bill advised he cannot run the entire conference and needs volunteers to assist, particularly with Registration that had been led by Richard Holt, who also passed away. Bill advised that Rubye Hahn would assist and that Donnie Smith would handle the nametags and conference attendee packages. Bill advised that Larry Duncan had agreed to creation and printing of the Conference booklet. Bill advised that he had not gone through the documents Jo had been using to schedule the Conference educational tracks. Bill also advised there would be a called meeting of the Conference Committee very soon. He stated the Perdido Resort had made a mistake in our booking dates for the 2005 conference and that the Shrimp Festival would begin the day after our conference ended. That mistake has been corrected for the 2006 and 2007 conference schedule. Roger Wilson advised there are about 5 booths available in the vendor hall.

11 LATA Reports:

- A Birmingham – Harold Parker had nothing to report.
- B Huntsville – Larry Duncan had nothing to report.
- C Mobile – George Williams had nothing to report
- D Montgomery – Donnie Smith had nothing to report

12 Old Business –

- A Roger Wilson asked the membership who had applied for a Homeland Security grant, and reported that the Homeland Security grants have been distributed to the Counties.
- B. Roger Wilson advised the mobile PSAP vehicle has been procured and is being outfitted. Bids have been received on the VoIP ANI/ALI Controller for the vehicle. Vernon Lee advised the membership that every PSAP needs to work with their local serving telephone company to find a suitable location for the vehicle ahead of time. Roger advised the vehicle radio system can be programmed for any ECD frequencies, but that he

needed a list of every agency's frequency list so they could be saved to a file and installed once the vehicle was deployed to that agency. He also reminded the membership of the need to have a paging file built ahead of time as well. He advised that he will take it to the annual conference if it is ready by that time. Art Faulkner advised that all ECD's must be NIMS compliant.

C. Bill Brodeur discussed the duties of the Nominating Committee, and that since Roger Humphrey had declined to serve on the Nominating Committee as the chapter by-laws direct, Donnie Smith had been appointed as Chairman of the Nominating Committee. Harold advised that Roger Humphrey had served 2 terms as Chapter President and he elected not to serve on the nominating committee. John Ellison requested the chapter modify the by-laws to include the requirement of a letter of approval for all nominees. Roger Humphrey asked if any candidate thought they would not be able to get the letter and none indicated there would be a problem. Ray Preston read the proposed language for consideration of the membership as follows

"*For any nomination received by Alabama NENA, the nominee must continue to meet the policy of providing a letter of approval by their hiring authority as well as meeting all requirements of the Alabama NENA Constitution*."

Motion to approve – Cheryl Robinson
Second – Greg Silas
Motion Carried with no further discussion

An additional motion was read by Ray Preston as follows:

"*If for some reason the immediate Past President cannot or will not serve as Chairman of the Nominating Committee, the Executive Board of Alabama NENA will appoint the Chairman of the Nominating Committee*."

Motion to approve – John Ellison
Second – Art Faulkner
Motion Carried with no further discussion

Donnie Smith stated the positions open for nomination and the names of current nominees as follows:

President – Harold Parker and Johnny Hart
Birmingham LATA – Bill Brodeur and Larry Wright
Mobile LATA – George Williams
Commercial – Ray Preston
At Large – Roger Wilson and Sabrina Harris

Alabama Chapter of the National Emergency Number Association (NENA)

Donnie Smith opened the floor for nominations for President

Call 1 – No additional nominations
Call 2 – No additional nominations
Call 3 – No additional nominations
Motion to close nominations for President – Art Faulkner
Second – Chris Heger
Motion Carried
Nominees are Harold Parker and Johnny Hart

Donnie Smith opened the floor for nominations for Birmingham LATA Vice President .

Call 1 – No additional nominations
Call 2 – No additional nominations
Call 3 – No additional nominations
Motion to close nominations for Bham LATA VP – Johnny Hart
Second – Roger Humphrey
Motion Carried
Nominees are Bill Brodeur and Larry Wright

Donnie Smith opened the floor for nominations for Mobile LATA Vice President .

Call 1 – No additional nominations
Call 2 – No additional nominations
Call 3 – No additional nominations
Motion to close nominations for Mobile LATA VP – Chris Heger
Second – Johnny Hart
Motion Carried
Nominee is George Williams by acclamation

Donnie Smith opened the floor for nominations for Commercial Vice President .

Call 1 – No additional nominations
Call 2 – No additional nominations
Call 3 – No additional nominations
Motion to close nominations for Commercial VP – Art Faulkner
Second – Margaret Bishop
Motion Carried
Nominee is Ray Preston by acclamation

Donnie Smith opened the floor for nominations for Vice President at Large

Call 1 – No additional nominations
Call 2 – No additional nominations
Call 3 – No additional nominations
Motion to close nominations for Bham LATA VP – Johnny Hart
Second – Roger Humphrey
Motion Carried
Nominees are Roger Wilson and Sabrina Harris

Donnie advised that all nominees who have not already done so must provide a letter of approval from their hiring authority. If no letter has been received by the date the ballots have been prepared for printing, the ballot will be noted that no letter of approval has been received. The ballots will be mailed no less than 40 days from the annual conference. Ballots must be postmarked not later than September 20, 2005 in order for them to be counted. In the event a ballot cannot be postmarked by September 20, 2005, ballots will be received at the annual conference until 2:00 PM Monday, October 10, 2005. The nominating committee will use the most currently available membership list provided by national NENA. There will be no blank ballots at the conference. Any ballots marked "Return to Sender" will be available at the conference for those individuals. John Ellison advised all members to verify their membership status on the national NENA web site. Dorothy further advised that she knows of some incorrect addresses in the NENA database and advised members to review their information to ensure they receive a ballot.

13 New Business –

A. Bill Brodeur advised that the AL NENA webmaster John Ellison and Conference site webmaster Chuck McKinley are not satisfied with the current web hosting arrangement and that it had been put on a month-to-month contract so that when a more suitable hosting provider was located, it could be moved. The membership agreed to allow John Ellison and Check McKinley to negotiate for a more suitable web hosting provider.

Harold Parker offered to update the Chapter Web Site ECD page containing the surcharge rate. A motion was offered to recommend to the membership that Harold Parker be authorized to compile, update and maintain the data for the surcharge collection web page.

Motion – Roger Wilson
Second – Roger Humphrey
Motion Carried

B. Bill Brodeur announced the CMRS Board will conduct a survey of ECD's and Wireless Carriers to aid in providing proof that existing wireless funding is insufficient to complete Phase 2 implementation. Bill advised that state auditors requested certification from the CMRS Board that all agencies receiving wireless surcharge distribution are still ECD's. The CMRS Board will send a letter that must be certified annually by each ECD that they are still an ECD in order to continue to receive the CMRS wireless surcharge distribution.

14. Alabama 911 State Association – Bill Brodeur announced the AAND meeting will occur following lunch. There will be a presentation by TCI for a proposed Statewide E911 Database.

15. National NENA Request – Bill Brodeur advised that National NENA has requested that during the recess of Congress in August and September, 2005, that all ECD's invite their Congressmen to visit their PSAP and try to get support for all national 911 issues. Bill Brodeur advised he would forward a sample letter of invitation to John Ellison to be placed on the chapter web site.

16. For the Good of the Association –
A. Harold Parker reminded all present that there are many requests of ECD's for their current surcharge rate. He thanked Talladega County E911 for beginning the list and submitting it to the chapter web site. Harold offered to go through the list and get all agencies data up to date. Larry Wright stated it sometimes took a week to get changes posted. Art Faulkner advised that vendors are looking for one point of contact in a state to maintain this data, and further advised that vendors are not required to search out the correct rate from ECD's. Bill Brodeur suggested that the list also contain secondary PSAP's under control of a single ECD. By consensus, Harold Parker will ensure the list gets updated and submitted to John Ellison for posting on the Alabama NENA web site.

17. Next Chapter Meeting October 11, 2005 at a time to be announced during the Annual Conference at Orange Beach, AL. Blessing for lunch was offered by Roger Humphrey.

Motion to Adjourn – Art Faulkner
Second – Harold Parker
Motion Carried.